

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT
Docket No. 04-E-0251

Edward J. Burke

v.

Bunny's Superette, Inc.,
Thomas M. Burke, Marie I. Burke,
and Bernardine P. Donelson

**RESPONSE TO THE POST-TRIAL MEMORANDUM SUBMITTED BY MARIE I.
BURKE AND BERNARDINE P. DONELSON**

NOW COMES Plaintiff Edward J. Burke by and through his attorney, Vincent A.

Wenners, Jr. Esq., and respectfully submits the following Response:

I. INTRODUCTION

The Defendants' Post-Trial Memorandum submitted by the defendants in this case contains several assumptions and errors that will be addressed point by point below.

II. ISSUES FOR REBUTTAL

A. Store ownership

The Defendants' Post-Trial Memorandum (Defendants' Memorandum) asserts in several places that the various members of the Burke family were not co-owners of the store prior to its incorporation in 1971. On page four (4) of the Memorandum it states, "Prior to the incorporation... Edward Burke, Bernardine Donelson and Thomas Burke were not owners of Bunny's Suprette." On page five (5), the Memorandum states that Marie Burke "...decided to gift a 25% interest in the business to each of her children," which implies that they were not

already co-owners.

In fact, there was a long-standing oral agreement that everything would be shared equally among all the members of the family, and the corporation was formed as an expression of that intent. The children had worked in the store at various times without pay even though there was no "obligation and/or expectation" that they would work in the store. (Defendants' Memorandum, p. 3.) This work illustrates the oral agreement of shared ownership, since they would help the store build equity by working without salary when they had few expenses, and would take a salary after they moved out of their parent's house and had more expenses. (Defendants' Memorandum, p. 3 -4.)

When the family decided to incorporate in 1971, there is no evidence presented that the 25% shares allotted to each family member was a "gift." Instead, the incorporation merely formalized part of the equal-share oral agreement that already existed. There is no evidence of gift taxes paid, or even contemplated. Edward Burke was the one who approached the incorporating attorney, and he was the one who provided the attorney with the information necessary to incorporate. (Defendants' Memorandum, p. 5.) The very fact that the shares were distributed equally is evidence of the underlying agreement; if Marie had in fact had sole ownership, she could have incorporated the business to retain a controlling interest, or given the children non-voting shares, or one of several corporate structures other than even shares.

B. The Stock Transfer

The Defendants' Memorandum asserts that the Parole Evidence Rule should bar Edward Burke's attempt to avoid the written stock restriction. (Defendants' Memorandum, p. 14- 15.) If this Court finds that the transfer of stock was a gift, then such gift would violate the underlying

agreement that all family members would share in the business equally. If this Court finds that the transfer of stock was a sale for consideration, then the restriction agreement must be enforced on its face, and the Corporation must be given the opportunity to buy those shares. Either way, the transfer violated the intent of the previous family agreements.

Even if the Court were to find that the stock transfers at issue were gifts, they would still violate the stock restriction. The Defendants' Memorandum admits that the stock restriction was entered into to "limit the ability of an outsider (i.e. individuals outside the family)" from buying an ownership in the store (Defendants' Memorandum, p. 5 - 6) and also admits that a court may use the "circumstances and context" in which a document is negotiated to interpret its terms if those terms are ambiguous. (Defendants' Memorandum, p. 11.) The context of this agreement was clearly to keep the ownership of the family business within the family. Allowing "gifts" would totally defeat this purpose.

The Defendants' Memorandum states that there is insufficient evidence to support a determination that the transfer of shares was not a gift due to consideration or as a result of undue influence. (Defendants' Memorandum, p. 12.) In fact, there is ample evidence for both consideration and undue influence. Both Bernardine Donelson and Thomas Burke testified that they had met with each other and with Marie Burke in the weeks before the transfer on April 1, 2004 and the First Amendment to the Trust on April 5, 2004. (Plaintiff's Memorandum, p. 30.) The Trust Amendment gave Bernardine Donelson the residue of the estate and the transfer gave control of the store to Thomas Burke. The Amendment was the consideration for the transfer.

C. Real Estate Assets

The Defendants' Memorandum claims that Edward Burke may not rely on statements made by Bernard Burke regarding ownership rights because of the Statute of Limitations. (Defendants' Memorandum, p. 13.) In fact, none of Edward Burke's assertions rely in any way on evidence that would be affected by this rule.

Edward Burke does not rely on statements made to him by Bernard Burke, nor is he making a claim against the estate of his father. Therefore the Statute of Limitations under RSA 556:5.5 (Defendants' Memorandum, p. 13) does not apply. Instead, Edward Burke seeks relief based upon the oral agreement that had always been in effect among the family members, namely that all the property be shared equally. Edward Burke had acted in reliance on this agreement throughout the many years that he worked to improve the family business, and his reliance makes that agreement enforceable.

D. Edward Burke's Entitlement to His Share of the Properties

The Defendants' Memorandum states that Edward Burke has failed to set forth "sufficient evidence to support a determination that he is entitled to any of the properties." (Defendants' Memorandum, p. 16) The Defendants base this entirely on their contention that the Statute of Frauds prevents an action maintained "upon a contract for the sale of land" without a written agreement. (Defendants' Memorandum, p.16-17.) The Statute of Frauds is wholly inapplicable here, because the case at bar is not an action upon a contract for sale.

Instead, this case is an action in equity, as there was never a sale of land that was contested. Edward Burke "admits that performance of services was not exchanged for ownership." (Defendants' Memorandum, p. 17.) Since there was no exchange of ownership, the

Statute of Frauds does not apply. Instead, the performance of services was done in reliance on the oral agreement, in furtherance of the shared assets of the family business. The family had always acted as though all members had an equal share in the family's assets, and Edward Burke relied on this agreement for his whole working life. This reliance makes the oral agreement enforceable.

III. CONCLUSION

The transfer of shares and real estate from Marie Burke to Thomas Burke and the execution of a will and revocable trust (and the transfer of real estate to that trust) by Marie Burke were breaches of the terms of the oral agreement and the result of the undue influence of Thomas Burke. When the disposition of a will and its "pourover" trust is unreasonable or unjust, a court may find evidence of undue influence sufficient to compel restitution of transferred property. (Plaintiff's First Trial Memorandum, p. 25, citing Curtice v. Dixon, 74 N.H. 386 (1907)). Here, the transfer was clearly unjust in light of the many years of family agreement that the family business was to be owned equally by all members of the family. Thomas Burke controlled all financial aspects of his mother's life: he wrote all her checks and paid all her expenses; he arranged for the will and trust to be drafted; he drove her to a lawyer to draft a will and trust and to sign the will and trust and he paid the lawyer's bill for the will and trust; he reviewed every "important document" for her and advised her what to sign. At trial Marie Burke was unable to articulate her "estate plan," and she was not even able to identify the documents that she had signed, let alone understand their import. Thomas Burke participated in all estate planning discussions. The Defendant concedes it did not produce witnesses to refute allegations of undue influence, yet such witnesses were available including Marie Burke's entire family,

Attorney Lamontagne, and Attorney Ansell. The Defendants' Memorandum merely states, "there was also no evidence to prove... undue influence. (Defendants' Memorandum, p. 12.) In fact, undue influence was shown, and therefore the will and trust should be found invalid. (Plaintiff's Memorandum, p. 25, citing Edgerly v. Edgerly, 73 N.H. 407, 408 (1905)).

The Plaintiff has demonstrated by ample evidence that he acted in reliance on the family agreement for many years, and that this reliance makes that oral agreement enforceable. The deeds, will, and trust executed by Marie Burke were clear breaches or anticipatory breaches of the agreement, and the breaches were the direct result of the undue influence of the Defendant Thomas Burke superimposing his will and desires upon and overcoming the will and free choice of Marie Burke.

Therefore, the Plaintiff asks that this Court order specific performance of that agreement as well as that ancillary relief to specific performance requested in his Post-Trial Memorandum.

Respectfully submitted:
Edward J. Burke
By his Attorney,

Dated: July 7, 2005

Vincent A. Weners, Jr., Esquire
84 Bay St.
Manchester, N.H. 03104
(603) 669-3970

CERTIFICATION

I hereby certify that a copy of the within Memorandum of Law has this date been forwarded to James A. Normand, Esquire, Ovide Lamontagne, Esquire, Danielle Pacik, Esquire and Ruth Tolf Ansell, Esquire, opposing counsel.

Dated: July 7, 2005

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THE STATE OF NEW HAMPSHIRE
Northern District of Hillsborough County

300 Chestnut Street
Manchester, NH 03101 2490
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NOTICE OF DECISION

OVIDE M LAMONTAGNE ESQ
DEVINE MILLIMET & BRANCH
111 AMHERST ST PO BOX 719
MANCHESTER NH 03105

04-E-0251 Edward J. Burke, et al v. Bunny's Superette, Inc., et al

Enclosed please find a copy of the Court's Order dated 8/23/2005
relative to:

Final Order

08/23/2005

John Safford
Clerk of Court

cc: Vincent A Weyners, Jr., Esq.
James A Normand, Esq.
Ruth Ansell, Esq.
Danielle L. Pacik, Esq.

RECEIVED AUG 24 2005

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS.
NORTHERN DISTRICT

DOCKET NO. 04-E-251

EDWARD J. BURKE

v.

BUNNY'S SUPERETTE, INC.,
THOMAS M. BURKE, MARIE I. BURKE,
AND BERNADINE P. DONELSON

ORDER

The Petitioner, Edward J. Burke ("Edward"), brings this action against his mother, Marie I. Burke ("Marie"), his two siblings, Thomas M. Burke ("Thomas") and Bernadine P. Donelson ("Bernadine"), and Bunny's Superette, Inc. ("Bunny's"), seeking broad relief in connection with rights and interests he claims under a purported oral agreement. Edward avers that many years ago, when he and his siblings still lived with their parents, a verbal agreement or understanding was reached among all concerned family members that all family members would equally own the family business and other accumulated property. In this regard, Edward asserts that, under this agreement, with the death of the two parents, the siblings would come to equally own said assets. Edward further avers that this original oral agreement or understanding was reaffirmed by the individual respondents upon the death of his father, Bernard Burke ("Bernard"), in

1971, that he fulfilled his obligations under the agreement and fully relied on it, and that the individual respondents have taken actions since about 1999 to wrongfully deprive him of his contract-based rights. In this regard, Edward particularly challenges: (1) Marie's creation of a will and revocable trust in 1999 and her conveyance of certain property into the trust; (2) Marie's later trust-related actions in 2004 to further limit his claimed property entitlements, including her conveyance, through the trust, of both stock in Bunny's and certain real properties to Thomas; and (3) Bernadine's conveyance of her stock in Bunny's to Thomas in 2004 at about the same time her mother conveyed hers through the trust. Edward also asserts that Thomas has been guilty of exerting undue influence over Marie to have her take action against him, that he has violated a claimed "fiduciary duty of a de facto attorney," and that he has violated the Uniform Fraudulent Transfer Act, RSA Chapter 545-A. Finally, he claims that Thomas is proceeding, or has proceeded, particularly through corporate special meetings relative to Bunny's, in ways which are contrary to, and violative of, his contract-based rights.

The individual respondents vigorously oppose Edward's contentions. They assert that no oral agreement, as suggested by Edward, was ever in place, and they contend, among other things, that they have acted properly and within their rights relative to pertinent inheritance and property interests herein.

The Respondent, Bunny's, also opposes Edward's case, and has also interposed a counterclaim, contending that Edward has failed to repay certain indebtedness due the corporation.

A trial occurred over two days -- June 15 and June 16, 2005. During the trial, the Court received testimony from several witnesses, either live or through videotaped deposition, and also received a number of exhibits into evidence. The Court, thereafter, was also provided post-trial memoranda.

Upon consideration of the pertinent evidence, and the arguments presented, the Court finds and rules as follows.

I Background

Bernard, with his wife Marie, established a food business in the early 1950's. The principal food market, known as Bunny's Superette, came to be located on Webster Street, Manchester, New Hampshire. When the food business began, the three children, Bernadine, Edward and Thomas were, respectively, about 12, 10 and 6 years of age. The business was unquestionably considered a family business, and the Burke siblings worked in it throughout their childhood without pay. Nonetheless, their parents retained full control (legal and otherwise) of the business. They made all pertinent decisions, and retained full control of business finances and operations. The children were provided with all necessities and were given spending money and use of the family vehicle or vehicles. They had friends, engaged in sports and extracurricular activities, and were encouraged by their parents to go to college after high school.

After graduation from high school, all of the siblings continued, at least for a time, to work in the family food business, either part time or full time. However, only Edward continued without interruption to work in the business.

Both Bernadine and Thomas attended college, and received financial support from their parents. Bernadine went on to, among other things, teach for several years, and to marry. She did not return to work at the family food store except on a sporadic basis. Thomas, for his part, went into the military after college where he served for several years. He came to return to work in New Hampshire in the late 1960's, and came to return to work in the family food business. When he did this, he received from his parents a salary for his work.

As stated previously, Edward remained in the family business and did not go to college. He continued to work particularly with his father and continued to work for a time with no salary. During this period, however, his parents paid for his living expenses, provided him spending money, and gave him use of the family vehicle or vehicles. Moreover, when the Petitioner married in about 1966, he moved out of his parents' home and came to receive a salary for his work efforts.

There is no question that Edward worked hard and constructively in the family business. He was deeply attached to his father. Indeed, at trial he testified that the time working with his father were "the best years of his life." Certainly, as well, Edward considered himself to be an important contributor to the family business. Nevertheless, and whatever his subjective views were in this regard, Edward has here failed to show that any contract or understanding agreed to by all concerned (including his mother) was ever entered into so that he and his siblings were afforded some enforceable form of ownership interest in the family business and in the other properties owned by their parents. To the

contrary, the evidence shows that Bernard retained strong control over the family business and related properties so long as he lived, and particularly worked in partnership with his wife, Marie, in so doing. In this connection, it was Bernard, over some objection from Edward, that determined that Thomas should be allowed to return to the family business in the late 1960's when Thomas left the military.

It is true that Edward came to be very much involved in the business's financial affairs, even while his father was alive, and also played a significant role in business operations, expansion initiatives, and construction activities. It is also true that, as time went on, both Marie and Bernadine became increasingly less involved in actual business operations, and Edward (and also Thomas) took on increasing responsibility. Nonetheless, and particularly in the case of Edward, it has not been shown that he continued to work in the business because of any enforceable promise or guarantee of part ownership. Rather, the Court finds that Edward stayed in the business, worked therein, and dealt as well with other property owned by his parents, because he was attached to the business and to his father, and not because of any real or enforceable agreements or guarantees of ownership.

In or about 1970, Bernard became ill and died on May 12, 1971. He left a will that provided each of his children with only one dollar, and gave the rest of his estate fully to his wife, Marie. See T. Burke Ex. A. In addition, and as the surviving joint tenant, Marie became sole owner of certain real and other properties which had been purchased or obtained during the marriage and which

were still possessed when Bernard died. These included real property in Manchester located at 121 Arah Street, 18 Rockland Avenue, 68 Webster Street, 77 Webster Street, and 753 Pine Street.

Edward never contested or challenged his father's will, although it did not recognize or confirm any purported "equal ownership" agreement. Nor did he take at that time any other action challenging his mother's property interests. Instead, he worked with his mother and siblings, and with the family's trusted lawyer, Charles Dunn, Esq., to create a corporation to operate, in the future, the family business. This corporation, (Bunny's) was established with Marie and the children each having a 25% ownership interest. However, in connection with other remaining properties, Marie retained full ownership.

Edward asserts that at or about this time the family members all reaffirmed the prior "equal ownership" agreement. He points to the "equal ownership" status set up as to the corporation, and avers that the real property and other property that his mother inherited were kept in his mother's name only for tax and income reasons. The Court finds otherwise.

The Court finds that in allowing the establishment of a corporation for the family business, Marie agreed to provide, or allow, a 25% ownership interest to each of her children and to retain that same percentage interest for herself. She did this not because of any prior agreement or understanding as to "equal ownership", but principally because at that time, and with her husband's death, this action recognized her children's contributions to the business, and, most significantly, effectively worked to keep her sons fully involved in the business.

The ownership arrangement appears to have been first suggested to Marie by Bernadine. At the same time, Marie retained full ownership of all other properties.

As part of the incorporation process, Edward, along with his mother and two siblings, entered into a stock restriction agreement which provides:

In the event that any stockholder during his lifetime desires to sell any of his stock, he shall first offer it or such part of it as he wishes to sell, to the corporation at the "agreed price" . . . and the corporation shall have sixty (60) days to accept or reject the offer. If the corporation rejects the offer, the offer shall be repeated to the other stockholders in proportion to their holders [sic] and the said stockholders shall have sixty (60) days to accept or reject the offer. If the other stockholders reject the offer, then the holder shall be free to sell said stock to any other party, which party shall take subject to this restriction.

See Exhibit B to the Petition for Injunction.

The above-cited stock restriction is the only one that was put in place to limit a shareholder's right to transfer stock holdings. No stock restriction agreement was put in place to prohibit or hinder a shareholder from gifting his/her stock interests.

After the business's incorporation, Edward and Thomas operated and managed Bunny's for many years, indeed until early 1996. The two brothers worked to expand operations, and purchased and/or owned stores outside of Manchester. Edward and Thomas set their salaries, and each took the same salary. The profitability of their business operations fluctuated: some years (e.g. between 1980 to 1985) the business was quite successful, and the brothers each earned incomes in the \$60,000 to \$80,000 range. In other years, however, (e.g. 1993 to 1995) their business operations did less well and each, as a

consequence, earned less income (i.e. in the \$30,000 to \$40,000 range). See T. Burke Ex. B.

In the meantime, the brothers, (and increasingly Thomas by himself over time) managed their mother's real estate and other holdings. Rental and other income, or revenues attributable to said holdings (or their sale), were maintained in accounts for her; her needs were covered or provided for through said accounts; and she even received in some years a salary from the business -- as did Bernadine. Nonetheless, Marie maintained complete ownership of her properties and never agreed (until recently) to part with any such ownership. Indeed, with the sale of certain real properties in 1987, that is, those located at 100 Webster Street and 18 Rockland Avenue, she retained all sale proceeds even though Edward requested at that time that he be given a portion of the proceeds.

Over the years, Edward's relationship with his mother and his siblings worsened. In February, 1996, he abruptly left his actual work situation at Bunny's and went to work at another family/grocery business in Manchester, Jon O's Market, Inc., a business involving one of his sons. Edward claims that he left his work at Bunny's because he caught Thomas stealing some cash proceeds. The evidence suggests, however, that the problems between the brothers were of a broader nature, and, to some degree, involved Edward's increased involvement, prior to his departure, with the Jon O's Market, Inc. business.

At the time he ceased working at Bunny's, Edward owed the Company monies because of past shareholder loans. Although he has made some

payments in that regard, Edward continued to owe, with accrued interest, the sum of \$35,207.87 as of about the time the Company asserted its counterclaim herein. To be sure, in some past years the brothers were able to fully cover loans they had taken by later bonuses. This, however, was not always possible, and Edward's outstanding indebtedness was not subject to such bonus coverage.

From early 1996 onward, Edward, his wife, his children, and his grandchildren had almost no contact with Marie or Thomas or Bernadine. Indeed, Marie has never met Edward's grandchildren and has not had any real contact with his children since they were very young.

In 1999, Marie created a will and revocable trust, to provide for the distribution of her estate at her death. In these documents, she did not treat her children equally. Her stock in Bunny's and her property interests in related business real estate were slated to go to Thomas upon her death. See Pl.'s Exs. 1 and 4.

In March, 2004, Marie, in her capacity as trustee of the Marie I. Burke Revocable Trust, conveyed certain real properties associated with Bunny's to Thomas. See T. Burke Ex. G; Pl.'s Ex. 6. Said properties, and her stock in Bunny's, had earlier been transferred to the Trust. Then, in April, 2004, Marie, again through her trust, and Bernadine, individually, both conveyed their entire stock interests in Bunny's to Thomas. See e.g. Pl.'s Exs. 7 and 20.

Thomas gave no money or other consideration for these conveyances either to Marie (or her Trust) or Bernadine. At about the time the conveyances

were effectuated, Marie amended her trust, changing the dispositions for her children and others. Among other things, Marie amended the Trust to change her disposition, upon her death, to Edward. See Pl.'s Ex. 2.

After Edward instituted this present action, Marie made further amendments to her trust documents to eliminate any disposition to Edward. See Pl.'s Ex. 30. She then later further amended the trust in September 2004 to create a residuary trust for Bernadine. See Pl.'s Ex. 3.

Once he obtained from his mother and Bernadine their stock in Bunny's, Thomas took actions to change the composition of Bunny's Board of Directors and otherwise consolidate his control over the business.

II. Discussion

In order to establish an oral agreement or understanding of the nature suggested by the Petitioner, he is required to establish its existence by clear and convincing evidence. See Tsiatsios v. Tsiatsios, 140 N. H. 173, 176 (1995); Shaka v. Shaka, 120 N. H. 780, 782 (1982). This he has failed to do. Rather, the evidence supports the conclusion that no such "equal ownership" agreement was ever reached. Moreover, while Edward worked many good years in the family business, he obtained substantial benefits for his efforts.

Edward, however, also argues that the transfers of Bunny's stock that Marie (through her trust) and Bernadine, individually, made to Thomas in the spring of 2004 were not gifts but "sales" within the meaning of the pertinent stock restriction agreement. In addition, Edward accuses Thomas of wrongdoing as to the 2004 conveyances, and of exerting undue improper influence over Marie.

The Court first observes that it lacks jurisdiction to directly deal with trusts such as Marie's revocable trust, and with wills. See RSA 547:3 I. (a) and (c) (Supp. 2004); RSA 498:1 (1997 & Supp.2004). The Court thus declines to directly deal with Edward's challenges to Marie's trust and will-related actions, including his contentions that Thomas has wrongfully acted in connection therewith, or has exerted undue influence.

However, and insofar as the Court has jurisdiction herein, it finds and rules that no conveyances of Bunny's stock in April, 2004 have here been shown to have been a form of "sale" under the stock restriction agreement. As to Bernadine's stock conveyance at that time, it has not been established that it involved any consideration provided by, or created by, Thomas. The Court finds that while Bernadine determined to make the stock conveyance after she discussed the matter with both Marie and Thomas, she did so not because she received anything of value from Thomas, but because she felt it best for all concerned. Bernadine trusts and believes in both Marie and Thomas - - who both have long-standing and good relations with her. While Marie did make revocable provisions for Bernadine in her trust, the Court does not find that these somehow constitute consideration from Thomas for Bernadine's conveyance of her stock to him.

Nor does the Court find in this case any basis to provide Edward any relief in connection with special meetings or corporate action that Thomas has recently initiated or taken after he obtained the stock conveyances.

Accordingly, the Court finds and rules that Edward has failed to establish entitlement to any of the relief he seeks.

Turning now to Bunny's counterclaim, the Court finds and rules that Edward owes Bunny's the sum of \$35,207.87 to the date the counterclaim was instituted. See in particular Bunny's Ex. K. Contrary to Edward's contentions, the Court finds that there was no proper ability, by virtue of corporate earnings in the last fiscal year Edward actually worked at Bunny's, to reduce Edward's debt through bonuses, and that "loans to stockholders" were not repaid each year.

In sum, the Court rules in favor of the Respondents in connection with Edward's claims for relief insofar as these are properly presented, and otherwise dismisses said claims for lack of jurisdiction. With respect to the counterclaim of Bunny's, the Court enters judgment in favor of said Corporation, and as against Edward, in the amount of \$35,207.87.

The parties have advanced claims for attorney's fees in this matter. The Court declines to award any attorney's fees herein. In connection with the Respondents' assertions that Edward has here acted in bad faith, the Court makes no such finding.

Certain parties have filed requests for findings of fact and rulings of law. Insofar as any such proposed findings and rulings are consistent with this Order they are **GRANTED**; otherwise they are **DENIED**.

SO ORDERED.

Date

8/23/05


JOHN M. LEWIS,
Presiding Justice

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
NORTHERN DISTRICT

SUPERIOR COURT
04-E-0251

Edward J. Burke

v.

Bunny's Superette, Inc.,
Thomas M. Burke, Marie I. Burke,
and Bernardine P. Donelson

**PLAINTIFF'S MOTION TO SET ASIDE, MODIFY AND/OR RECONSIDER
DECREE DATED AUGUST 23, 2005**

NOW COMES the Plaintiff, Edward J. Burke, by and through his attorney, Vincent A. Weners, Jr., Esquire, and moves this Honorable Court to set aside, modify and/or reconsider its Decree dated August 23, 2005 and forwarded by Notice of the Clerk dated August 23, 2005, pursuant to Superior Court Rule 73, on the following grounds:

1. The Court ruled that it did not have jurisdiction to hear claims related to undue influence in the matter of the Trust and will-related actions of Marie Burke, pursuant to RSA 547:31 (a) and (c), and 498:1 (1997 & Supp. 2004).
2. The Court tried in full all of the allegations and issues of Thomas' undue influence over Marie in the creation of and amendments to a revocable, inter vivos Trust, deeds of all her real estate to the Trust, transfers of other property to the Trust, and a deed from the trust of the land and buildings on which Bunny's Superette is situated to Thomas Burke.
3. The Defendants did not contest the Court's jurisdiction and, in fact, argued that the creation of the Trust, its amendments, transfers to and from the Trust, and other transfers to Thomas Burke were lifetime gifts, free of undue influence, and motivated by Marie Burke's fear that Edward Burke

would "contest her estate" after she died.

4. This Court has sole jurisdiction.

RSA 547:3, I (a) and (b) provide:

"I. The probate court shall have exclusive jurisdiction over the following:

- (a) The probate of wills.

(b) The granting of administration and all matters and things of probate jurisdiction relating to the composition, administration, sale, settlement, and final distribution of estates of deceased persons, including the assignment of homestead and claims against the executor or administrator for those services related to the prior care and maintenance of the decedent and the administration of insolvent estates and appeals therefrom."

The case at bar does not involve the probate of wills.

RSA 498:1 provides:

"The superior court shall have the powers of a court of equity in the following cases: Charitable uses; trusts other than express trusts as that term is defined in RSA 564-A:1; fraud, accident and mistake; the affairs of partners, joint tenants or owners and tenants in common; the redemption and foreclosure of mortgages; contribution; waste and nuisance; the specific performance of contracts; discovery; cases in which there is not a plain, adequate and complete remedy at law; and in all other cases cognizable in a court of equity, except that the court of probate shall have exclusive jurisdiction over equitable matters arising under its subject matter jurisdiction authority in RSA 547, RSA 547-C and RSA 552:7."

5. Accordingly, the Superior Court has jurisdiction over Trusts other than "express trusts as that term is defined in RSA 564-A:1." The Probate Court has exclusive jurisdiction over the interpretation, construction, modification, and termination of Trusts, as that term is defined in RSA 564-A:1, I.

6. RSA 564-A:1 provides:

"As used in this chapter:

I. "Trust" means an express trust created by a trust instrument, including a will, whereby a trustee has the duty to administer a trust asset for the benefit of a named or otherwise

described income or principal beneficiary, or both; "trust" does not include a resulting or constructive trust, a business trust which provides for certificates to be issued to the beneficiary, an investment trust, a voting trust, a security instrument, a trust created by the judgment or decree of a court, a liquidation trust, or a trust for the primary purpose of paying dividends, interest, interest commons, salaries, wages, pensions or profits, or employee benefits of any kind, an instrument wherein a person is nominee or escrowee for another, a trust created in deposits in any financial institution, or other trust the nature of which does not admit of general trust administration;.....".

Marie Burke's Trust is not an express Trust subject to the exclusive jurisdiction of the Probate Court.

It has nothing to do with the administration of the estate of a person still living or deceased and, read together with her will, is intended to be a "pour-over" Trust specifically designed so as not to be

"subject to the administration or jurisdiction of the Probate Court". See, RSA 563-A:1, II; and Wills,

Trusts, and Gifts, DeGrandpre (1997), section 27-2.

7. Further, The Uniform Trust Code confirms DeGrandpre's Treatise.

RSA 564-B:1-102 provides:

"This chapter applies to express trusts, charitable or noncharitable, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust."

RSA 564-B:7-710 provides:

"Nothing in this article is intended to modify or limit the provisions of RSA 564 as they apply to testamentary trusts. To the extent the provisions of this article conflict with the provisions of RSA 564 as they apply to testamentary trusts, the provisions of RSA 564 shall control."

RSA 564-B:2-201 provides:

"(a) The court may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law.

(b) A trust, other than a trust created by a will, is not subject to continuing judicial supervision unless ordered by the court.

(c) A judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights."

In the case at bar no interested person invoked the jurisdiction of the Probate Court.

8. Even if the Superior Court did not have jurisdiction, which issue was never raised at the trial level and which the Plaintiff contests, the Court erred in allowing the Plaintiff to present his entire case and then, *sua sponte*, declining to deal with his challenges to Marie Burke's Trust (and transfers to and from the Trust). The Court should, at a minimum, have remanded the matter at that time to the Probate Court.

WHEREFORE, the Plaintiff prays that this Honorable Court:

- A. Grant the within Motion to Set Aside, Modify and/or Reconsider the Decree dated August 23, 2005; and alternatively
- B. Remand this matter to the Probate Court; and
- C. For such other and further relief as may be just and equitable.

Respectfully submitted,
Edward J. Burke
By his attorney,

Dated: 8/31/05

By: 

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Manchester, NH 03104
(603) 669-3970

CERTIFICATION

I hereby certify that a copy of the within Motion to Set Aside, Modify and/or Reconsider Decree has this date been forwarded to James A. Normand, Esquire, counsel for Bunny's Superette, Inc., Ovide M. Lamontagne, Esquire, and Danielle Pacik, Esquire co-counsel for Thomas M. Burke, and Ruth Tolf Ansell, Esquire, counsel for Marie I. Burke and Bernardine P. Donelson, opposing counsel.


Vincent A. Wenners, Jr., Esquire

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
NORTHERN DISTRICT

SUPERIOR COURT

Docket No. 04-E-0251

Edward J. Burke

v.

Bunny's Superette, Inc.
Thomas M. Burke
Marie I. Burke
Bernardine P. Donelson

OBJECTION TO
PLAINTIFF'S MOTION TO SET ASIDE, MODIFY AND/OR RECONSIDER DECREE DATED
AUGUST 23, 2005

NOW COME Respondents, Marie I. Burke and Bernardine P. Donelson, by and through their attorneys, Ansell & Anderson, P.A., and respectfully object to the Plaintiff's Motion to Set Aside, Modify and/or Reconsider Decree dated August 23, 2005. In support of their Objection, Marie I. Burke and Bernardine P. Donelson submit the following statements:

1. On August 23, 2005, this Court issued an Order ruling in favor of the Respondents in that the Plaintiff had failed to establish entitlement to any relief requested in his Petition for Injunction.
2. The Plaintiff does not seek reconsideration of the Court's ruling with regard to the original matter before this Court, as incorporated in the Plaintiff's Petition for Injunction.
3. The Marie I. Burke Revocable Trust is an express trust created by a trust instrument within the meaning of RSA 547-A:1, holding trust assets for the lifetime benefit of Marie I. Burke and for the ultimate benefit of some of her

descendants.

4. The Probate Court has exclusive jurisdiction over the interpretation, construction, modification and termination of express trusts under RSA 564-B:2-203 and RSA 547:3,I(c), over the administration of estates under RSA 547:3,I(a) and (b), and over equitable matters arising under its subject matter jurisdiction authority under RSA 547.
5. The Superior Court has no jurisdiction to determine the validity of Marie I. Burke's Will and Trust.
6. As indicated in the Respondents' Supplemental Post-Trial Memorandum, the validity of Marie I. Burke's estate planning documents was not raised prior to the Trial and had no bearing on the issues which were raised in the Plaintiff's Petition for Injunction.
7. The Plaintiff's request for a constructive trust would fall within the Superior Court's concurrent jurisdiction with the Probate Court under RSA 547:3,II (a), but this issue was not pled prior to the Trial and is without merit.
8. The Superior Court also has jurisdiction over the gift of stock from Marie I. Burke (through her Trust) to her son, Thomas M. Burke, and the evidence presented at Trial confirmed that this transfer was free from undue influence or fraud.
9. The Superior Court also has jurisdiction to determine that no consideration was given for the gift of the stock, including the provisions of the Marie I. Burke Trust which provide for Bernardine Donelson.

WHEREFORE, Respondents Marie I. Burke and Bernardine P. Donelson respectfully request that this Court:

- A. Deny the Plaintiff's Motion to Set Aside, Modify and/or Reconsider Decree dated August 23, 2005; and
- B. Grant such other and further relief as the Court deems equitable, just, and proper.

Respectfully submitted,

MARIE I. BURKE AND
BERNARDINE P. DONELSON

By and through their attorneys,

ANSELL & ANDERSON, P.A.

Date: September 2, 2005



Ruth Tolf Ansell, Esquire
40 South River Road, Unit #32
Bedford, NH 03110
(603) 644-8211

CERTIFICATION OF SERVICE

I certify that on this date I delivered copies of the foregoing to: Vincent A. Wengers, Jr., Esquire, 84 Bay Street, Manchester, NH 03104; James A. Normand, Esquire, 15 High Street., Manchester, NH 03104; Ovide M. Lamontagne, Esquire, 111 Amherst Street, Manchester, NH 03101; and Danielle Pacik, Esquire, 111 Amherst Street, Manchester, NH 03101 by first-class, U.S. mail.

Date: September 2, 2005

Ruth Tolf Ansell, Esquire

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
NORTHERN DISTRICT

SUPERIOR COURT

Docket No. 04-E-0251

Edward J. Burke

vs.

Bunny's Superette, Inc., Thomas M. Burke, Marie I. Burke
and Bernardine P. Donelson

**RESPONDENT THOMAS M. BURKE'S MOTION TO JOIN
OBJECTION TO PLAINTIFF'S MOTION TO SET ASIDE, MODIFY
AND/OR RECONSIDER DECREE SUBMITTED BY MARIE BURKE AND
BERNARDINE DONELSON**

NOW COMES the Respondent, Thomas M. Burke, by and through his attorneys,
Devine, Millimet & Branch, Professional Association, and respectfully moves to join the
Objection to Plaintiff's Motion to Set Aside, Modify and/or Reconsider Decree submitted by
Marie Burke and Bernardine Donelson, and states as follows:

1. On August 23, 2005, Marie Burke and Bernardine Donelson submitted an
Objection to Plaintiff's Motion to Set Aside, Modify and/or Reconsider Decree. All of the issues
raised in the Objection to Plaintiff's Motion to Set Aside, Modify and/or Reconsider Decree by
Marie Burke and Bernardine Donelson apply equally to the claims brought against Thomas
Burke. Accordingly, Thomas Burke moves to join in their Objection to Plaintiff's Motion to Set
Aside, Modify and/or Reconsider Decree.

Respectfully submitted,

THOMAS M. BURKE

By his attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: September 7, 2005

By:



Ovide M. Lamontagne, Esquire

Danielle L. Pacik, Esquire

111 Amherst Street

Manchester, NH 03101

(603) 669-1000

CERTIFICATE OF SERVICE

I hereby certify on this 7th day of July 2005, a copy of the foregoing Motion to Join Objection to Plaintiff's Motion to Set Aside, Modify and/or Reconsider Decree Submitted by Marie Burke and Bernardine Donelson was delivered via first class mail to Vincent A. Wengers, Jr., Esquire, counsel for Edward J. Burke, James A. Normand, Esquire, counsel for Bunny's Superette, Inc., and Ruth Tolf Ansell, Esquire, counsel for Marie I. Burke and Bernardine P. Donelson.



Danielle L. Pacik, Esquire

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THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
NORTHERN DISTRICT

SUPERIOR COURT

Docket No. 04-E-0251

Edward J. Burke

vs.

Bunny's Superette, Inc., Thomas M. Burke, Marie I. Burke
and Bernardine P. Donelson

**RESPONDENT THOMAS M. BURKE'S SUPPLEMENTAL OBJECTION TO
PLAINTIFF'S MOTION TO SET ASIDE, MODIFY AND/OR RECONSIDER DECREE**

NOW COMES the Respondent, Thomas M. Burke, by and through his attorneys,
Devine, Millimet & Branch, Professional Association, and respectfully submits this
supplemental objection to the Plaintiff's Motion to Set Aside, Modify and/or Reconsider Decree
("Plaintiff's Motion to Set Aside"). In support thereof, Mr. Thomas Burke states as follows:

1. This case arises from a dispute among the shareholders of Bunny's Superette, Inc.
(hereinafter referred to as "Bunny's Superette"). The plaintiff, Edward J. Burke, sought
permanent injunctive relief to enjoin Marie I. Burke and Bernardine P. Donelson from
transferring their shares in Bunny's Superette to Thomas M. Burke. The plaintiff also sought
permanent injunctive relief to enjoin Marie Burke from transferring certain real properties to
Thomas Burke. The plaintiff alleged that the parties had entered into an oral agreement in 1971
to transfer the unincorporated grocery store owned by them (and known as Bunny's Superette) to
a corporation organized in such a manner that the three children would be equally treated with
respect to their parent's estates, including, but not limited to, the business, the land and building
on which it was situate. At trial, the plaintiff argued for the very first time that the creation of a

revocable trust and the transfer of real property from Marie Burke to Thomas Burke were the result of undue influence.

2. After a two day bench trial, this Court issued a Final Order dated August 23, 2005. The Court found that "[i]n March, 2004, Marie, in her capacity as trustee of the Marie I. Burke Revocable Trust, conveyed certain real properties associated with Bunny's to Thomas. . . Said properties, and her stock in Bunny's, had earlier been transferred to the Trust. Then, in April, 2004, Marie again through her trust, and Bernardine, individually, both conveyed their entire stock interests in Bunny's to Thomas." Final Order at 9. Although the Court held it lacked subject matter jurisdiction to directly deal with testamentary trusts such as Marie's revocable trust, the Court concluded that "no conveyances of Bunny's stock in April, 2004 have here been shown to have been a form of 'sale' under the stock restriction agreement." *Id.* The Court further found that "Edward has failed to establish entitlement to any of the relief he seeks."

3. In an apparent effort to carve out issues for bringing subsequent litigation in probate court, the plaintiff now has filed a motion for reconsideration on the grounds that the Court should have issued a decision regarding the alleged undue influence that Thomas Burke exercised "over Marie Burke in the creation of and amendments to a revocable, inter vivos Trust, deeds of all her real estate to the Trust, transfers of other property to the Trust, *and a deed from the trust of the land and buildings on which Bunny's Superette is situated to Thomas Burke.*" Plaintiff's Motion to Set Aside at ¶2 (emphasis added). As discussed herein, the plaintiff's motion for reconsideration should be denied because the Court has already exercised jurisdiction over the *inter vivos* transfers such as the stock and deed of property from Marie Burke (through her trust) to Thomas Burke.

4. Over the course of the trial, a substantial amount of evidence was presented to

confirm that the transfers of stock and property were free from undue influence or fraud. It is not only implicit from the Court's decision that the transfer of both the shares and the property associated with Bunny's Superette were properly made, but also that there was no undue influence or fraud associated with these *inter vivos* gifts. The Court held that pursuant to RSA 547:3, I(a), (c) and RSA 498:1 it lacked jurisdiction "to directly deal with trusts such as Marie's revocable trust, and with wills." Final Order at 11. The Court therefore "decline[d] to directly deal with Edward's challenges to Marie's trust and will-related actions, including his contentions that Thomas has wrongfully acted in connection therewith, or has exerted undue influence." *Id.*

5. The Court nonetheless exercised jurisdiction over the *inter vivos* transfer of properties relating to the stock and real property from Marie Burke (through her trust) to Thomas Burke. These transfers are within the superior court's jurisdiction because they do not involve "the interpretation, construction, modification, [or] termination" of a trust. See RSA 547:3, I(c). These issues instead involve the enforceability of an *inter vivos* gift which happened to pertain to property that had been placed in a revocable trust. The Court appropriately exercised jurisdiction in denying the plaintiff's request to set these transfers aside and to impose a constructive trust, and by evaluating the validity of these transfers on the merits.¹ See RSA 547:3, III ("[n]othing in this section shall be construed upon the probate court any additional authority over intervivos trusts beyond that authority exercised by the superior court prior to the adoption of this section").

6. In short, the plaintiff's recent motion for reconsideration is a thinly veiled attempt to preserve issues for future litigation. In light of the fact that these matters have already been decided, the plaintiff's request for reconsideration should be denied.

¹ It is defendant's understanding that the Court nonetheless declined to grant this relief because Mr. Burke failed to establish sufficient facts to support such a request. It also bears noting that the plaintiff never alleged in his pleadings that the shares of stock and/or property were transferred under undue influence.

WHEREFORE, Thomas M. Burke respectfully requests that this honorable Court:

- A. Deny Plaintiff's Motion to Set Aside, Modify and/or Reconsider Decree;
- B. Grant Thomas M. Burke such other and further relief as justice may require.

Respectfully submitted,

THOMAS M. BURKE

By his attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: September 15, 2005

By:



Ovide M. Lamontagne, Esquire

Danielle L. Pacik, Esquire

111 Amherst Street

Manchester, NH 03101

(603) 669-1000

CERTIFICATE OF SERVICE

I hereby certify on this 15th day of September 2005, a copy of the foregoing Supplemental Objection to Plaintiff's Motion to Set Aside, Modify and/or Reconsider Decree was delivered via first class mail to Vincent A. Wengers, Jr., Esquire, counsel for Edward J. Burke, James A. Normand, Esquire, counsel for Bunny's Superette, Inc., and Ruth Tolf Ansell, Esquire, counsel for Marie L. Burke and Bernardine P. Donelson.



Danielle L. Pacik, Esquire

HILLSBOROUGH, SS
NORTHERN DISTRICT

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT
04-E-0251

Edward J. Burke

v.

Bunny's Superette, Inc.,
Thomas M. Burke, Marie I. Burke,
and Bernardine P. Donelson

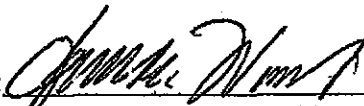
**PLAINTIFF'S RESPONSE TO RESPONDENT, THOMAS M. BURKE'S
SUPPLEMENTAL OBJECTION TO PLAINTIFF'S MOTION TO SET ASIDE, MODIFY
AND/OR RECONSIDER DECREE**

NOW COMES the Plaintiff, Edward J. Burke, by and through his attorney, Vincent A. Wenners, Jr., and submits the following Response to the above Supplemental Objection, and states as follows:

The law in New Hampshire is settled that the Superior Court has jurisdiction of inter vivos transfers and trusts until the transferor dies. See, Wills, Trusts & Gifts, DeGrandpre (1997), Section 27-2. The Probate Court has no jurisdiction over the transfers to and from, creation and administration of, and inter vivos trusts until a death occurs. The Probate Court only has jurisdiction over an inter vivos trust, prior to a death, if an interested party files a motion to invoke the same. RSA 564-B:2-201.

This Court ruled it had no jurisdiction to decide whether or not the transfers from Marie Burke to Thomas Burke and the inter vivos trust, and from the trust to Thomas Burke, were the result of undue influence or fraud. The Court is in error. The Court did not, as Thomas Burke now contends, "implicitly" make such a ruling.

Respectfully submitted,
Edward J. Burke
By his attorneys,

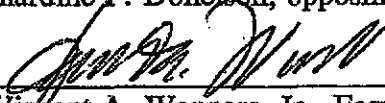
By: 

Vincent A. Weners, Jr., Esquire
84 Bay Street
Manchester, NH 03104
(603) 669-3970

Dated: September 21, 2005

CERTIFICATION

I hereby certify that a copy of the within Plaintiff's Response has this date been mailed to James A. Normand, Esquire, counsel for Bunny's Superette, Inc., Ovide M. Lamontagne, Esquire, and Danielle L. Pacik, Esquire, counsel for Thomas M. Burke, and Ruth Tolf Ansell, Esquire, counsel for Marie I. Burke and Bernardine P. Donelson, opposing counsel.



Vincent A. Weners, Jr., Esquire

THE STATE OF NEW HAMPSHIRE
Northern District of Hillsborough County

300 Chestnut Street
Manchester, NH 03101 2490
603 669-7410

NOTICE OF DECISION

DANIELLE L PACIK ESQ
DEVINE MILLIMET & BRANCH
PO BOX 719
MANCHESTER NH 03105-0719

04-E-0251 Edward J. Burke, et al v. Bunny's Superette, Inc., et al

Enclosed please find a copy of the Court's Order dated 9/26/2005
relative to:

Motion to Set Aside

09/27/2005

John Safford
Clerk of Court

cc: Vincent A Widders, Jr., Esq.
James A Normand, Esq.
Ovide M Lamontagne, Esq.
Ruth Ansell, Esq.

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS.
NORTHERN DISTRICT

DOCKET NO. 04-E-251

EDWARD J. BURKE

v.

BUNNY'S SUPERETTE, INC.,
THOMAS M. BURKE, MARIE I. BURKE,
AND BERNADINE P. DONELSON

ORDER

The petitioner, Edward J. Burke, has filed a Motion to Set Aside, Modify and/or Reconsider Decree dated August 23, 2005. Upon consideration, the Court **DENIES** the petitioner's motion.

In so doing, the Court first observes that the trust of Marie I. Burke is plainly an "express trust" within the meaning of RSA 564-A:1, I. Second, the Probate Court has "exclusive jurisdiction over equitable matters arising under its subject matter jurisdiction authority in RSA 547" RSA 498:1; See also RSA 547:3-b, and RSA 547:3, I (a), (c) and (d). The petitioner misstates the law when he asserts that "[t]he law in New Hampshire is settled that the Superior Court has jurisdiction of inter vivos transfers and trusts until the transferor dies." See Pl.'s Response to Resp., Thomas M. Burke's Supplemental Objection to Plaintiff's Motion to Set Aside, Modify and/or Reconsider Decree, dated September 21, 2005 at 1.

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Third, the Superior Court subject matter jurisdiction restraints require that this Court not pass on those issues that directly pertain to the trust of Marie I. Burke. The Court clarifies that it makes no rulings as to, for example, the petitioner's challenge to the transfer of stock (through the trust) to Thomas M. Burke from Marie I. Burke as trustee, or as to his challenge to the deeding through the trust to Thomas M. Burke of certain real property associated with Bunny's Superette.¹ Fourth, the parties' failure to raise the subject matter jurisdiction limitation of this Court during the trial does not somehow provide this Court with proper subject matter jurisdiction. Finally, any party here remains able to initiate appropriate proceedings in the Probate Court as to matters or issues within that Court's subject matter jurisdiction.

SO ORDERED.

Date

9/28/05


JOHN M. LEWIS,
Presiding Justice

¹ The Court notes that its findings relative to Marie I. Burke's will and trust, as set forth on pages 9-10 of its Order dated August 23, 2005, do no more than track the undisputed chronology of the will/trust executions Marie I. Burke entered. Further, the Court withdraws the finding that "Thomas gave no money or other consideration for these conveyances either to Marie (or her trust) or Bernadine." This specific finding goes beyond the Court's subject matter jurisdiction insofar as it directly deals with Marie I. Burke's trust-related actions, and is unnecessary in connection with the Court's treatment of Bernadine P. Donelson's stock conveyance.

The State of New Hampshire

Hillsborough COUNTY

PROBATE COURT

IN RE: Edward J. Burke v. Bunny's Superette, Inc.; Thomas M. Burke; Marie I. Burke; Bernardine P. Donelson

DOCKET NUMBER: _____

PETITION/MOTION

Petitioner Name Edward J. Burke Telephone (603) 669-2148

Mailing Address 13 Meadowcrest Road; Hooksett, NH 03106

Petitioner Name _____ Telephone _____

Mailing Address _____

Attorney Name Vincent A. Weners, Jr. Telephone (603) 669-3970

Mailing Address 84 Bay Street; Manchester, NH 03104

The petitioner(s) states as follows:

1. The Hillsborough County Superior Court ruled that it did not have jurisdiction to rule on Petitioner's claims related to the fraud, duress, and/or undue influence of Thomas M. Burke in the creation of and amendments to Marie I. Burke's revocable, inter vivos, "pour over" trust, deeds of real estate to the trust, transfers of other property to the trust, and a deed from the trust of the land and buildings on which Bunny's Superette, Inc. is situated to Thomas Burke under RSA 547:3, I(a) and (c) and 498:1 (1997 & Supp. 2004), for such was within the exclusive jurisdiction of the Probate Court.
2. The Petitioner has filed a Notice of Appeal with the New Hampshire Supreme Court regarding the final order issued by the Hillsborough County Superior Court on August 23, 2005 (Exhibit A) as well as a denial of Petitioner's Motion to Set Aside said Order issued on September 27, 2005 (Exhibit B).
3. A copy of the Notice of Mandatory Appeal to the New Hampshire Supreme Court is appended hereto (Exhibit C).
4. The Superior Court ruled, in effect, that the Probate Court has exclusive jurisdiction over the matter. The Petitioner believes that the Superior Court has jurisdiction but he does not wish to waive any rights he may have in this Court.

The petitioner(s) asks that the court grant the following:

1. Preservation of all of Petitioner's rights in this Court as of this day, including Petitioner's right to bring this action in Probate Court if Petitioner loses his appeal to the New Hampshire Supreme Court.
2. Any further relief this Court deems just and necessary.

Date:

October 20, 2015



Petitioner Signature

Date:

Petitioner Signature

THE STATE OF NEW HAMPSHIRE

_____ COUNTY

DATE _____

Subscribed and sworn to by the above named petitioner(s) that all matters herein contained are true to the his/her/their best knowledge and belief. Before me,

My Commission Expires _____
Affix Seal

Justice of the Peace/Notary Public

ORDER

☐ Petition/motion is granted.

☐ Petition/motion is denied.

Date:

Judge

The State of New Hampshire

HILLSBOROUGH COUNTY

PROBATE COURT

IN RE: EDWARD J. BURKE v. BUNNY'S SUPERETTE, INC.
THOMAS M. BURKE; MARIE I. BURKE; BERNARDINE P. DONNELSON

DOCKET NUMBER: 2005 - 2058

OBJECTION

1. Name of person objecting Marie I. Burke Telephone (603) 623-2042
Capacity of person objecting (relationship to case) Respondent
Mailing Address 121 Arah Street, Manchester, NH 03104
Name of person objecting Bernardine P. Donelson Telephone (603) 867-4033
Capacity of person objecting (relationship to case) Respondent
Mailing Address 16 Fox Lane, Auburn, NH 03032
2. Attorney Name Ruth Tolf Ansell Telephone (603) 644-8211
Mailing Address 40 South River Road, Unit 32, Bedford, NH 03110
3. I object to the motion filed by Edward J. Burke asking for:
Preservation of all Petitioner's rights in this Court as of this day, including Petitioner's right to bring this action in Probate Court if Petitioner loses his appeal to the New Hampshire Supreme Court. Any further relief this Court deems just and necessary.
4. The specific basis or reasons for my objection are as follows:
The pleadings filed in this Court fail to state a basis for any relief. Petitioner indicates that his claims related to the fraud, duress, and/or undue influence of Thomas M. Burke in the creation of and amendments to Marie I. Burke's revocable, inter vivos, "pour over" trust, deeds of real estate to the trust, transfers of other property to the trust, and a deed from the trust of the land and buildings on which Bunny's Superette, Inc. is situated to Thomas Burke. No such claims were included in the Petitioner's Petition for Injunction dated June 4, 2004 which initiated the Superior Court action. The Petition for Injunction was never amended to include such claims nor was any Petition specific to said claims filed.

Therefore, I ask that the motion be denied.

MARIE I. BURKE AND BERNARDINE P. DONELSON

By and through their attorneys,

ANSELL & ANDERSON, P.A.

Date: October 31, 2005


Ruth Tolf Ansell, Esq.

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY

DATE October 31, 2005

Subscribed and sworn to by the above named person(s) that all matters herein contained are true to the best of his/her knowledge and belief. Before me,

My Commission Expires
Affix Seal

5/23/06


Justice of the Peace/Notary Public

VICTORIA L. GAUDREAU
Notary Public - New Hampshire
My Commission Expires May 23, 2006

The State of New Hampshire

HILLSBOROUGH COUNTY

PROBATE COURT

IN RE: EDWARD J. BURKE v. BUNNY'S SUPERETTE, INC.
THOMAS M. BURKE; MARIE I. BURKE; BERNARDINE P. DONELSON
DOCKET NUMBER: 2005 - 2058

CERTIFICATION OF COPIES TO PARTIES

I hereby certify that a copy of the Objection to Petitioner's Petition/Motion has been forwarded to the parties listed below who have filed an appearance for this case or are otherwise interested parties.

<u>Name of Party</u>	<u>Address</u>
Edward J. Burke	13 Meadowcrest Road Hooksett, NH 03106
Vincent A. Wengers, Jr., Esq. Attorney for Edward J. Burke	Craig, Wengers, Craig & Capuchino, P.A. 84 Bay Street Manchester, NH 03104
Thomas M. Burke	647 Walnut Street Extension Manchester, NH 03104
Danielle L. Pacik, Esq. & Ovide M. Lamontagne, Esq. Attorney's for Thomas M. Burke	Devine, Millimet & Branch, P.A. PO Box 719 Manchester, NH 03105
Marie I. Burke	121 Arah Street Manchester, NH 03104
Bernardine P. Donelson	16 Fox Lane Auburn, NH 03032
Bunny's Superette, Inc. c/o James A. Normand, Esq.	Normand & Associates 15 High Street Manchester, NH 03101-1628

Date: October 31, 2005



Ruth Tolf Ansell, Esq.

